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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-187881

DATE: October 3, 1977

MATTER OF: ASPR § 22-107 - Proposed Revision

- DIGEST: 1. Revision to ASPR § 22-107 is proposed by Air Force which would add transportation services contracts to existing exceptions from ASPR prohibition against entering into service contracts extending beyond fiscal year current at beginning of contract term. ASPR prohibition and currently listed exceptions are consistent with statute and GAO decisions which preclude, absent other statutory authority, obligation of annual appropriations to meet bona fide needs arising in subsequent years. Exceptions here proposed for transportation services have no independent statutory authority and are therefore not authorized.
2. Proposed revision to ASPR § 22-107 by Department of the Army would permit execution of employment contracts with school teachers for armed services dependents for period crossing two fiscal years. Since such teachers are employees of Government, contracts would be invalid to extent one-year funds available in fiscal year of contract execution were obligated for salaries to be paid for services performed in subsequent year. Contracts would also violate 31 U.S.C. § 665(a) to extent that they purported to obligate future fiscal year funds. Accordingly, proposed revision is not authorized.

This decision to the Secretaries of the Army and the Air Force is in response to separate requests from the Assistant Secretary of the Army (Installations and Logistics) and the Acting Assistant Secretary of the Air Force (Installations and Logistics), for our views

B-187881

concerning proposed revisions to Armed Services Procurement Regulation § 22-107 (1976 ed.). The Air Force proposes to add a new subsection (a)(v) so that § 22-107 will read as follows:

"22-107 Contract Term.

"(a) The term of a service contract that is funded by annual appropriations shall not extend beyond the end of the fiscal year current at the beginning of the contract term, unless the contract falls into one of the following categories:

(i) a one-year contract for maintenance of tools or facilities if authorized under the current Department of Defense Appropriations Act;

(ii) a multi-year service contract within the coverage of 1-322.8;

(iii) a one-year requirements or indefinite quantity contract, as defined in 3-409.2 and 3-409.3, in which any specified minimum quantities are certain to be ordered in the fiscal year current at the beginning of the contract term (see 1-318); or

(iv) a contract for expert or consultant services entered into in accordance with 22-204.2, or for educational services, which cannot feasibly be subdivided for separate performance in each fiscal year.

(v) a contract for transportation of dependent school children covering only the standard school term year.

"(b) Any contract entered into under the authority of (a)(iii) above shall contain the 'Availability of Funds' clause in 7-104.91(b)."

The Army proposes an additional subsection (a)(vi) as follows:

B-187881

"(vi) A contract for dependent school teachers covering only the standard school term year."

According to the submissions, contracts for transportation services and employment contracts for teachers of dependent children are entered into in direct support of a standard school year--i.e., September 1 through May 30. Prior to the change in fiscal year from July 1 through June 30 to October 1 through September 30, the full amount of such contracts was charged to a single fiscal year. With the change in fiscal year, the contract term could not extend across a single school year in view of ASPR § 22-107, as currently constituted, and our decisions cited infra. In this regard, the submission from the Assistant Secretary of the Air Force states as follows:

"The proposed revision to ASPR is predicated principally upon the view that the requirement for transportation for the academic year arises at the start of that year and is a bona fide need for the year in which the contract is executed even though only part of the services will be performed during that fiscal year. The service is not really severable in that the requirement exists only because of an independent, finite and determinable activity, and should therefore be a valid obligation of the fiscal year in which the contract is executed. There is authority for the proposition that services in a period overlapping two fiscal years may be charged to the appropriation for the first fiscal year if there is involved only one undertaking which is determinable both as to the services needed and the price to be paid at the time the contract is entered into."

Similar arguments are made in the Army submission as applied to employment contracts for the services of teachers of dependent children.

We have long held that in order to obligate a fiscal year appropriation for payments to be made in a succeeding year, the contract must have been made within the fiscal year sought to be charged and made to meet a bona fide need of that fiscal year. See, e.g., 33 Comp. Gen. 57, 61 (1953). Determination of what constitutes a bona

B-187881

bona fide need of a particular fiscal year depends in large measure upon the facts and circumstances of each particular case, and no general rule can be stated for application to all situations which may arise. 44 Comp. Gen. 399 (1965); 37 id. 155, 159 (1957). In general, however, contracts for services may be made for the duration of the appropriation period only since it is usually determined that the bona fide need for services arises when they are performed. See B-174226, March 13, 1972.

This rule is adhered to in order to carry out the dictates of 31 U.S.C. § 712a (1970), which provides as follows:

"Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year."

This statute and our decisions have been followed in ASPR § 22-107, which precludes, with certain exceptions, the execution of service contracts chargeable to annual appropriations extending beyond the end of the fiscal year current at the beginning of the contract term. The currently listed exceptions contravene neither 31 U.S.C. § 712a nor our decisions. For example, subsections (a)(i) and (ii) are based on specific statutory authority. Subsection (a)(iv), which pertains to expert or consultant services contracts entered into pursuant to ASPR § 22-204.2, only permits the execution of contracts extending beyond the current fiscal year where the contracts are for end products which cannot be feasibly subdivided. This comports with our general rule that a contract for materials to be delivered in succeeding fiscal years may be entered into as long as the bona fide need for such materials arose in the fiscal year in which the contract was executed.

Requirements and indefinite quantity contracts, as defined in ASPR §§ 3-409.2 and 3-409.3, are excepted from the contract term limitation of ASPR § 22-107 by subsection (a)(iii). Such contracts, when properly executed, only obligate funds of the fiscal year in which the contract is executed to the extent that materials and services are actually furnished in that year. Where it is permissible to use such contracting arrangements, materials delivered and services performed in subsequent fiscal years are deemed to meet bona fide needs of those subsequent fiscal years and are chargeable thereto. Cf., 42 Comp. Gen. 272, 277-278 (1962) and court cases cited therein.

B-187581

The ASPR provisions here proposed would permit the execution of a contract presumably sometime prior to September 1 and the obligation of then available appropriations for services extending beyond September 30--the end of the fiscal year. The transportation services to be performed would appear to meet bona fide needs arising only at the time the services are rendered, as is normally the situation with service contracts. The fact that the standard school term now crosses two fiscal years is of no consequence in this regard since the services are readily severable. Accordingly, since the subject contracts have no independent statutory authority, their execution would violate 31 U.S.C. § 712a, as interpreted by this Office.

With regard to proposed subsection (a)(vi), we have recognized that personnel with employment contracts at armed services dependents schools, entered into pursuant to 20 U.S.C. § 241, are employees of the United States. Franklin C. Appleby--Leave Without Pay: Waiver of Erroneous Payment, B-183804, November 14, 1975.^{1/} Pursuant to 31 U.S.C. § 712a and the bona fide needs rule noted above, we have repeatedly held that salaries and expenses of Government employees are payable only from appropriations made for the fiscal year in which the services are rendered or the expenses incurred. Appropriations may not be considered as obligated for such expenditures so as to authorize payments after the close of the fiscal year except by the actual rendition of services or the incurring of expenses prior to the expiration of the fiscal year. 38 Comp. Gen. 316 (1958) and cases cited therein. Accordingly, contracts entered into with dependents school teachers prior to the beginning of the standard school term would not properly obligate fiscal year funds then current for services to be rendered after September 30. Moreover, to the extent that the employment contracts purported to bind the Government to pay for services performed in the succeeding fiscal year out of the succeeding year's appropriation, this would violate the so-called "Antideficiency Act," 31 U.S.C. § 665(a)(1970), which prohibits the obligation of funds in advance of appropriations. 42 Comp. Gen., supra.

^{1/} See also Army Procurement Procedure, Sec. IV, Part 56 (1976 ed.), "Dependents School Teachers Contracts," which repeatedly refers to professional educators contracting to work at such schools as "employees."

B-187887

In view of the above, it is our opinion that the proposed revisions to ASPR 5 22-107 are not authorized.


Acting Comptroller General
of the United States